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No. 83-1520

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

LOCAL 222, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD and CONAIR CORPORATION,
Respondents.

On Petition from the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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1. The focus of the memorandum in opposition filed by the National Labor Relations Board is on the NLRB's recent decision in *Gourmet Foods, Inc.*, 270 N.L.R.B. No. 113 (May 14, 1984), which was issued after our petition for certiorari was filed. In *Gourmet Foods* the NLRB overruled its decision in the instant case and held that "nonmajority bargaining orders are not within our remedial discretion." 270 N.L.R.B. No. 113, slip op. at 22.

We acknowledge, of course, that the effect of *Gourmet Foods* is to make the NLRB a respondent in this case in fact as well as in name. But far from suggesting that review in this Court is unwarranted, the fact that the NLRB has reversed its field highlights the showing in our petition that the law on the issue presented here is in flux and thus provides an added ground for granting a writ of certiorari.[1]

2. The NLRB argues that notwithstanding its own internal disagreements and notwithstanding the fact that "the decision of the court of appeals here conflicts with the holding of the Third Circuit that the Board possesses authority to issue non-majority bargaining orders," NLRB Mem. at 5, our petition should be denied. Two justifications are proffered; neither can withstand analysis.

(a) The NLRB first argues that the question of the Board's statutory authority to issue what the Board labels "non-majority bargaining orders" is, at present, "academic" because "it is the position of two members of the current four-member Board that, even if the Board were empowered to issue non-majority bargaining orders . . . as a matter of policy [these two members] would prefer to refrain from doing so." *Id.* The two Board members who have expressed this position appear to have lost sight of their subordinate position in the legal hierarchy.

As this Court has had frequent occasion to remind the Board, Congress is the "expositor of the national interest" with respect to the national labor policy, *Ma-*

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[1] Given the clarity with which the current Board majority has set forth its views on the question of its authority to issue bargaining orders in cases such as this, there is nothing to be gained in terms of this Court being fully advised by deferring review of that question until "a case that reflects the current position of the Board," as the NLRB's Memorandum in Opposition (at 5) suggests. And if, as we argue, the decision below is wrong, such a deferral would deny the petitioner its rights.

chinists Local v. *Labor Board*, 362 U.S. 411, 429 (1960); "[t]hat policy cannot be defeated by the Board's policy," *id.*, *quoting Colgate Co.* v. *Labor Board*, 338 U.S. 355, 363 (1949). *See also, e.g.*, *American Ship Bldg.* v. *Labor Board*, 380 U.S. 300, 318 (1965). And, as the just-cited cases among many others establish, it is ultimately for this Court to determine as a matter of statutory interpretation whether Congress has established a policy which controls the resolution of a particular question.

Because that is so, a determination by this Court as to whether Congress has authorized the NLRB to exercise a particular power can never be "academic" to a determination by the Board as to the circumstances in which the agency will exercise that power, for the parameters of the NLRB's discretion are necessarily bound by the judgments Congress has made, as those judgments are definitely declared by this Court.[2] The instant case illustrates the point well. The question of statutory authorization presented herein boils down to whether Congress intended to foreclose absolutely the issuance of remedial bargaining orders whenever a union has been unable to obtain a majority of authorization cards or whether, *per contra*, Congress did not intend to place dispositive weight on the presence or absence of a card majority.[3] That question would be "academic" only if the Board were free, "as a matter of policy," to treat the absence of a card majority as determinative even if Congress had made a contrary decision. But the Board

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[2] To quote Judge Hutcheson's pithy words, "[t]he Board is a mere creature of the law. It is no 'Poo Bah' to loose or bind at will." *NLRB* v. *Dorsey Trailers*, 179 F.2d 589, 592 (5th Cir. 1950).

[3] Of course, we believe that this question has already been answered in *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), *see* Pet. at 10-14 and p. 5 *infra*, but the analytical point made in text is valid however *Gissel* is read.

plainly is not free to so override congressional determinations.[4]

The short of the matter is that this Court's resolution of the legal question presented here, far from being of academic interest, will go to the very essence of whether the Board can and should issue remedial bargaining orders in cases like this. The memorandum in opposition's contrary contention reflects the NLRB's failure to understand that its role is to exercise whatever discretion the Board has been delegated in light of the law as declared by this Court and not in blind disregard of that law. The extent of that misunderstanding is shown by a comparison of the NLRB's strained effort to find in *Gourmet Foods* an occasion to overrule its decision in this case while this petition for certiorari was pending, *see* 270 NLRB No. 113, slip op. at 2-7, ostensibly to clarify the law and avoid "needless litigation," *id.* at 7 n.24, with the NLRB's even more strained effort in the memorandum in opposition to dissuade this Court from truly clarifying the law by reviewing the basic legal question of the NLRB's statutory authority to issue remedial bargaining orders in cases such as this.

(b) The NLRB (and Conair) also contend that the decision of the court below is not inconsistent with this

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[4] In *Gourmet Foods* the two members of the Board who stated that, "as a matter of policy," they would never issue a "non-majority bargaining order" even if the Board on which they sat had been empowered by Congress to do so purported to base their "policy" determination upon the same ground on which they based their "legal" determination that they lacked the authority to issue such orders: their conclusion, drawn from their "review of the statute, its legislative history, Board and court precedent, and legal commentary," that such bargaining orders offend "an integral part of the Act's current substance and procedure." 270 NLRB No. 113, slip op. at 16. If this Court were to conclude that those members were wrong as a matter of law in their reading of the Act's "substance and procedure," the Court's conclusion necessarily would undermine the members' policy determination as well.

Court's decision in *NLRB v. Gissel Packing Co., supra.* According to the NLRB, *Gissel* merely "noted dictum of the Fourth Circuit suggesting that a bargaining order might be appropriate" where an employer's outrageous and pervasive unfair labor practices have foreclosed employee free choice. NLRB Mem. at 6.

Even if the Board's interpretation of *Gissel* were accurate, it would hardly detract from our petition, since all that the Board is claiming is that the question presented here is an open one in this Court; in that event the conflicting decisions of the Board and of the lower courts on that question, coupled with the importance of the question, would provide more than ample grounds requiring review by this Court. But he that as it may, the Board's interpretation of *Gissel* cannot be squared with the reasoning by which the *Gissel* Court affirmed the bargaining order in *Sinclair*, one of the consolidated cases decided by *Gissel*. We quoted this Court's discussion of *Sinclair* in our petition (at p. 13); neither the NLRB nor Conair comes to grips with that discussion in their memoranda.

CONCLUSION

For the foregoing reasons, and those stated in our petition, a writ of certiorari should be granted.

Respectfully submitted,

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